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HEARING

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In the Matter of:

Adjustment of the Rates for
Noncommercial Educational
Broadcasting Compulsory
License

Docket No. 96-6
CARP NCBRA

Library of Congress
James Madison Building
101 Independence Avenue, S.E.
Room LM414
Washington, D.C. 20540

Thursday,
March 19, 1998

The above-entitled matter came on for
hearing, pursuant to notice, at 9:30 a.m.

BEFORE:

THE HONORABLE LEWIS HALL GRIFFITH, Chairperson
THE HONORABLE EDWARD DREYFUS
THE HONORABLE JEFFREY S. GULIN

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ORIGINAL

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1 P-R-O-C-E-E-D-I-N-G-S

2 Q Mr. Bacon, could you tell the Panel how
3 the royalties you receive from BMI for your work when
4 it is performed on PBS compares with the royalties you
5 receive from BMI when your work appears on commercial
6 networks?

7 A I have an example here. The name of the
8 show is D-Day. The amount of performances means the
9 amount of stations on which the show is broadcast.

10 JUDGE GULIN: Do you have an exhibit
11 number?

12 MR. KLEINBERG: I think you would be
13 referring to exhibit number --

14 THE WITNESS: Sixty-five.

15 Q Yes, sixty-five.

16 A There is a slight differentiation on how
17 royalties are paid on theme music which tends to be
18 more like what you just heard there, as opposed to a
19 background piece.

20 I am not sure exactly how those are
21 figured, but there is some differentiation in how
22 those two are paid.

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1 If this particular show, D-Day were
2 performed on 18 stations on PBS, the amount of
3 royalties I would receive were \$.53.

4 If it were on 18 stations on a network
5 such as ABC, the rate would have been \$32.40.

6 On the background side of the music, if
7 these 18 performances were on PBS, the royalties would
8 have been \$5.01, and on the network it would have been
9 \$169.29.

10 A show called the Windsors, also a PBS
11 production, theme amount on three stations paid \$.18,
12 on network it would have paid \$5.40. Again, the
13 Windsors, 27 minutes, 20 seconds on three stations
14 paid \$2.00, on network it would have paid \$73.82.

15 Q Mr. Bacon, does the amount of work that
16 you do in composing and creating music for the PBS
17 programs as opposed to the network or commercial
18 television programs vary in terms of amount? Is there
19 less work required when you do the composition for PBS
20 programs?

21 A Well, I make a distinction between
22 documentaries and news programs. A lot of the work I

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1 do for ABC are news programs. They are time oriented.
2 They are incidents that have happened usually fairly
3 recently.

4 The kind of music required is more
5 synthesizer, much more background, much less music
6 used on news shows.

7 I have done a couple of shows that could
8 be characterized as news shows for PBS, but most of my
9 work on PBS is documentary where there is a much
10 greater amount of music and more focus on theme and
11 the time commitment is usually longer and more
12 involved in developing the show from its onset.

13 MR. KLEINBERG: Thank you, Mr. Bacon.

14 I have no further questions at this time,
15 Your Honors.

16 CHAIRPERSON GRIFFITH: All right. Mr.
17 Schaeffer do you have any cross?

18 MR. SCHAEFFER: I have no questions.

19 CHAIRPERSON GRIFFITH: Thank you. Mr.
20 Weiss?

21 MR. WEISS: Thank you.

22 Good morning, Mr. Bacon.

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1 THE WITNESS: Good morning.

2 CROSS EXAMINATION

3 BY: MR. WEISS

4 Q You testified that you composed --

5 CHAIRPERSON GRIFFITH: Excuse me, are we
6 still in Executive Session?

7 MR. WEISS: Yeah, I believe we should stay
8 there because a lot of my questions are going to go in
9 and out of areas that we probably want to keep off the
10 public record.

11 CHAIRPERSON GRIFFITH: Fine.

12 Q You testified that you composed 50 to 60
13 hours a week, 50 weeks a year?

14 A Yes.

15 Q And most of your composing is for
16 particular television or film projects for which you
17 have been hired by the producer of that program?

18 A Right.

19 Q How many projects do you have in the
20 pipeline at any given point in time?

21 A I would say at any particular time there
22 are probably five that are in the pipeline.

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1 Q And do those projects cross different
2 media, generally?

3 A Different networks?

4 Q Different networks, public television,
5 commercial broadcast television, cable television?

6 A Sure.

7 Q I understand you weren't available until
8 today because your time was somewhat constrained by
9 the projects you are working on.

10 A Right.

11 Q How would you rate your talent as a
12 composer?

13 A I think I am good. I think I might be
14 better at but I think I am considered to be pretty
15 good.

16 Q Would you agree that your services as a
17 composer are fairly in demand?

18 A Yes.

19 Q You said that much of your work has been
20 for public television. If you preferred to focus more
21 exclusively on commercial projects, broadcast
22 television and cable television, would you agree that

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1 your talents are sufficiently in demand that you could
2 probably find additional work in those areas as well.

3 A I think the reality is when I first moved
4 to New York 13 years ago I really didn't know where it
5 would take me.

6 The jobs that I decide to do are the jobs
7 people call me up for and I don't make any particular
8 distinction of what network it is on. Public
9 television is a place where my talents were
10 particularly successful.

11 Q If you decided to focus more exclusively
12 on documentary-type programming on cable television,
13 given your experience and talents do you think you
14 would be able to obtain more work in that area if that
15 was your primary focus of your efforts?

16 A It is hard to answer that because I don't
17 really look for work. I turn down more work than I
18 can possibly do.

19 I take each show individually, and within
20 the documentary scoring I am happy to work for any
21 particular network.

22 Q You say you turn down more work than you

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1 can possibly do. Do you, on occasion, turn down work
2 from broadcast commercial television networks?

3 A Yes.

4 Q And do you, on occasion, turn down work
5 for cable networks?

6 A Sure.

7 Q So, that if you preferred to, you could
8 have accepted those jobs at the exclusion of public
9 television projects that you worked on, correct?

10 A Yes, I can do any particular job that I
11 want for whatever reason I choose or don't choose to
12 do the job.

13 Q But, nevertheless, you have chosen to work
14 more exclusively on public television projects, is
15 that right?

16 A As I said before, the work kind of chooses
17 me and I don't really want to characterize it as
18 saying I particularly choose to work in one particular
19 area or another. The phone rings, I hear about the
20 job and I decide whether I can afford the time to do
21 it or not.

22 Q How long have you been a BMI affiliate?

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1 A Oh, 25 years.

2 Q And you said that for about the last 15
3 years of that you have been composing actively for
4 television and film?

5 A Right.

6 Q During that whole time you tended to
7 receive less from BMI in royalties for performance of
8 your work on public broadcasting than you do on
9 commercial television, is that correct?

10 A Right.

11 Q Yet, when you have had commercial projects
12 come your way, you have chosen not to take them and
13 instead have taken public television projects, is that
14 right?

15 A I don't think I ever studied my royalties
16 and made decisions based on that. The up-front fees
17 tend to have more to do with it than the royalties, I
18 would say.

19 Q Let's talk about the up-front fees.

20 In the typical project you worked on you
21 are hired in what is called a composer for hire
22 agreement, correct?

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1 A Right.

2 Q Pursuant to that agreement, the producer
3 of that program pays you a certain amount of money to
4 compose for them, correct?

5 A Right.

6 Q What is your going rate in up-front
7 payments from the producer in the projects you work on
8 today?

9 A I would say the range is from around
10 \$10,000 per hour of running time. I think I did one
11 show for \$17,000 and I did a NOVA for around \$9,000 or
12 \$10,000. So the range is probably an average of
13 \$12,000 to \$14,000 per hour.

14 MR. KLEINBERG: Per hour of show.

15 THE WITNESS: Yes, per hour of running
16 time of the show.

17 Q You are not paid based on the amount of
18 music in the show, just the length of the show?

19 A Right.

20 Q How many hours of shows do you tend to
21 compose for in a given year?

22 A I want to guess maybe 20. I have never

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1 really analyzed my business that way.

2 Q Okay. So, if you earn roughly \$12,000 to
3 \$14,000 in up-front fees per show and you said that
4 one-third of your up-front fees go to paying your
5 costs, correct?

6 A Correct.

7 Q So, that means the remaining two-thirds
8 come to you, correct?

9 A Well, that depends on how you want to
10 analyze that. I have a studio in mid-town Manhattan.
11 I have an assistant, my wife runs my business.

12 Coming to me, is that my profit?

13 Q Is that what is paid to you after your
14 costs?

15 A That is what comes out of my pocket for
16 the actual production costs. But, of course, there is
17 a lot more to running a business than that.

18 Q So, roughly, on average \$8,000 comes to
19 you, obviously you mentioned you had other costs as
20 well, but \$8,000 comes to you after you have taken the
21 project costs out?

22 A It goes into my business gross, yes.

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1 Q So, that means that if you have roughly 20
2 hours of programming for which you compose music per
3 year, that is around \$160,000?

4 A Gross?

5 Q That you receive after your costs for
6 composing, in up-front payments for your work as a
7 composer.

8 A That makes sense.

9 Q Why don't we look at an exhibit. I think
10 we are up to PB 20X?

11 Nineteen? PB 19X.

12 (WHEREUPON, THE DOCUMENT
13 REFERRED TO WAS MARKED AS PB
14 EXHIBIT NO. 20X FOR
15 IDENTIFICATION.)

16 Q This is a document that was produced to us
17 by BMI in discovery listing 1996 projects of Mr.
18 Bacon.

19 JUDGE GULIN: Before we take a look at
20 that, I have one question for Mr. Bacon.

21 The up-front fees that you receive, are
22 they about the same for PBS as for commercial

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1 television?

2 THE WITNESS: Roughly, yes.

3 Q Mr. Bacon, is this an accurate listing of
4 the projects you worked on in 1996?

5 A I am not sure I have that.

6 Q I am sorry; I thought you had that.

7 A Yes, this looks right.

8 Q Have you ever calculated how much you were
9 paid in up-front fees for working on these various
10 programs?

11 A No.

12 Q By the way, were these the only projects
13 you were composing for in 1996?

14 A I think so, yes. These are probably the
15 ones that were finished in 1996.

16 Q You say television scoring. Did you do
17 additional work outside of television as well in 1996?

18 A Possibly performing. I would say this is
19 pretty much it.

20 Q You mention that you perform in the band,
21 the Bacon Brothers with your brother. Do you get paid
22 when you perform with the Bacon Brothers?

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1 A Yes.

2 Q The Bacon Brothers have an album out now,
3 correct?

4 A Yes.

5 Q Do receive any money in connection with
6 that album?

7 A A little bit.

8 Q Now, when you compose for television
9 programs, is it accurate that on occasion that you
10 also work as a musician in the music that is being
11 created for that program?

12 A I am conductor.

13 Q Did you ever act as a musician?

14 A Playing? Yes, sure.

15 Q Are you a member of AFM, the American
16 Federation of Musicians?

17 A Yes, I am.

18 Q As an AFM member, are you entitled as well
19 to certain residual payments when performances of your
20 work are paid at certain points on television?

21 A Sure.

22 Q So, that is additional income that you

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1 earn from composing and working as a composer in
2 television.

3 A Well, it is not work as a composer in
4 television. The musicians' union requires that every
5 session have a leader.

6 Since I am the conductor, I am required to
7 be paid to do that.

8 Q Okay.

9 A I can't be in the studio. There has to be
10 a leader, a member of the union, in the studio.

11 Q Okay.

12 A I make a distinction. I am not being paid
13 to compose, I am being paid the same way I would bring
14 a clarinet player in.

15 Q Roughly how much do you earn per project
16 in residuals, as a musician?

17 A For what network? PBS?

18 Q For any network.

19 A For PBS, the musician contract that I pay,
20 there are two different scales. Three is one that
21 allows three years and I think three performances and
22 one that allows five years and five performances. I

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1 pay on the high side.

2 They can do five performances over five
3 years. At the end of five years, if they want to show
4 it again then they have to pay a re-use fee.

5 In network television, I believe you are
6 paid every time it is shown.

7 Q Roughly, how much do you earn from a
8 network television residual as a musician?

9 A The network shows that I do pretty much
10 don't use live musicians.

11 Q When you are acting as a live musician,
12 how much do you get paid?

13 A The scale for one session is around
14 \$220.00 and being leader, double, around \$440.00,
15 something like that.

16 Q How much do you make when you are a
17 musician on a public television program?

18 A It is roughly the same. In public we also
19 pay international and home video rights, so the scale
20 is higher.

21 But, as I said, that is a five year run
22 that public television doesn't have to pay residuals,

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1 where in the network it --

2 Q It is immediate.

3 A Right.

4 Q By the way, when you talked about the two-
5 thirds, one-third split as the two-thirds going to you
6 as the composer, did you include in your two-thirds
7 the amounts that you earn in residuals as a musician?

8 A Residuals from the --

9 Q From AFM.

10 A No, there would hardly affect it.

11 Q Do you have to pay yourself as a musician
12 when you are working on a project under AFM
13 guidelines?

14 A If I am in the studio, I am supposed to
15 put a contract through.

16 Q So, in that two-thirds, did you include
17 whatever money you make as the studio musician or is
18 that included as part of the one-third costs?

19 A Generally, what I do is I look at the --
20 I am not sure. I really don't remember.

21 It would be a fairly small per centage of
22 the entire musicians' union fee, whatever it was.

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1 Q Just to clarify, when your work as a
2 musician is performed on network television, you earn
3 a residual each time that work is performed, correct?

4 A I believe that is so.

5 Q But when it is performed on public
6 television, you don't start earning residuals until
7 five years down the line.

8 A Five years, right.

9 Q Now, in addition to the up-front fees you
10 earn and whatever composer royalties you earn on the
11 back end, you also indicated that you earn publisher
12 royalties as well from BMI.

13 A Right.

14 Q In the typical circumstance, is it your
15 understanding that BMI distributes roughly half of the
16 fees it collects from a particular medium to the
17 composers and the other half to the publishers?

18 A Yes.

19 Q And these are commonly referred to as the
20 composer share and the publisher share of the
21 royalties, correct?

22 A Yes.

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1 Q When you compose for most programs, the
2 usual practice, is it not, is that you keep the
3 composer share and the program producer has its own
4 publishing company and assigns the publishing rights
5 in your music to that music and they, the producer,
6 collects the publisher share from BMI, correct?

7 A Usually.

8 MR. KLEINBERG: I just want to object.
9 Are you talking all medium?

10 THE WITNESS: Yeah, it is usual.

11 Q If you look at the list of projects which
12 we marked as PB 20X which is the 1996 projects list,
13 for which of these projects did the program producer
14 entitle you to collect publisher share of royalties
15 from BMI as well as composer share?

16 A I really don't remember which ones.

17 Q Well, as an example, America on Wheels,
18 did you earn publisher share royalties on that
19 program?

20 A I am not sure. I would have to look and
21 see.

22 Q Who produces America on Wheels.

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1 A American on Wheels was WNET in New York.

2 Q Is it your understanding that the general
3 practice at WNET is to provide the composer, as part
4 of his up-front compensation with the publisher share
5 of royalties on the back-end?

6 A I am not sure. I don't do that much work
7 for them.

8 Q Do you recall circumstances where
9 commercial television network has given you the
10 publisher share of royalties to collect on the back
11 end?

12 A I can remember at times, yes.

13 Q And this would include the ABC television
14 network?

15 A No, not ABC.

16 Q Not broadcast television. When you said
17 commercial were your referring to cable television?

18 A Could be cable, I don't remember exactly.

19 Q You don't remember what programs that
20 occurred with?

21 A No.

22 Q Is it more often the case if you are gong

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1 to obtain the publisher share that will happen in a
2 public television project as opposed to a commercial
3 project?

4 A I don't understand the question.

5 Q Are you more likely to get the publisher
6 share of royalties from a public television project
7 than you are from a commercial television project?

8 A Not necessarily.

9 Q Are you more likely to get the publisher
10 share of royalties from a public television project
11 than from a broadcast commercial network project?

12 A I guess that would depend -- I would say
13 maybe you might be more likely than ABC, in
14 particular. It depends on what kind of a deal you can
15 strike.

16 Q If you would turn back to the royalties
17 statement which was marked as BMI Hearing Exhibit 1.
18 I guess since this is the publisher version we should
19 also look for completeness sake at BMI Exhibit 61
20 which is a reflection of your composer royalties from
21 BMI.

22 If you look at exhibit 61.

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1 MR. KLEINBERG: Just make sure that he has
2 it.

3 MR. WEISS: Do you have it?

4 THE WITNESS: Is that this? I have it.

5 Q If you look at the entry on exhibit 61 for
6 6/20/96, I guess that is second quarter 1996, foreign,
7 and there is a listing for \$17,517.00. Do you see
8 that?

9 A Right.

10 Q What is that line item refer to?

11 A I believe it refers to royalties that come
12 from various performing organizations around the world
13 that are affiliated with BMI.

14 Q And the same for the item at the bottom,
15 12/13/96, fourth quarter 1996, foreign?

16 A I would assume so, yes.

17 Q Do you know what portion of your foreign
18 royalties are attributable to performances of programs
19 that you create for public television?

20 A I would assume it is a similar split to
21 the United States. I really don't know.

22 Q Have you ever looked at that issue?

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1 A No.

2 Q So, you don't really know; you are just
3 making an assumption?

4 A Yes.

5 Q Would the same answer be true if I were to
6 ask you questions as to the publishing royalties that
7 you earn with the foreign items listed there, that
8 those reflect foreign distributions? Distributions to
9 you for foreign performances of your work as a
10 publisher?

11 A I assume so.

12 Q And that, likewise, you haven't examined
13 what portion of that comes from programs that you
14 originally produced for public television?

15 A No.

16 Q I believe you said earlier that what you
17 really care about when you are looking at a project is
18 the up-front payments, correct?

19 A I don't want to say that is all I look at
20 because it is not. It is complicated.

21 A lot of it depends on how enthusiastic
22 someone is. Some people put a lot of pressure on me

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1 to take a job and a lot of it depends on the nature of
2 the job.

3 There are a lot of different reasons that
4 I take a job.

5 Q Would you agree that you try to obtain as
6 much as you can in up-front payments from a producer
7 of a program?

8 A Yes.

9 Q Now, if you were fairly confident that for
10 a particular program being broadcast in a particular
11 medium you were going to earn a large level of
12 royalties from BMI in the back end, might you be
13 willing to accept a little bit less in up-front
14 payments for the chance to earn a lot more in the back
15 end?

16 A It is possible.

17 Q Is the reverse also true?

18 A Which?

19 Q If you didn't expect to earn very much on
20 the back end you might try to obtain more in the
21 front-end as a guaranteed up-front fee?

22 A That is also possible.

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1 Q You talked about Bacon Exhibit 65. That
2 was the comparison chart between the payments you
3 receive for performances on PBS and extrapolation as
4 to what to what you would have made if those were
5 performed on network television.

6 A Right.

7 Q Did you prepare this chart?

8 A No, I didn't.

9 MR. KLEINBERG: Why don't we wait one more
10 second until we -- take this one.

11 THE WITNESS: Take it?

12 No, I didn't prepare it.

13 Q Who did?

14 A Hughes, Hubbard and Reed.

15 Q Did you check the accuracy of the
16 calculations that were made in the chart.

17 A I think I did, yes.

18 Q Do you know how those items were
19 calculated?

20 A I think I do.

21 Q In this chart you compare individual
22 performances on PBS with what you say you would have

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1 earned on commercial broadcast television network,
2 correct?

3 A Yes.

4 Q You are aware that the national ratings
5 for a broadcast commercial network program tend to be
6 a lot higher than they do for a public television
7 program, correct?

8 A I would assume that.

9 Q You are also aware that there are a number
10 of national cable television networks with ratings
11 that are comparable to PBS, is that correct?

12 A Yes.

13 Q Is it not the case that if you were to
14 compare the fees you earned from PBS to the fees you
15 earned from a national cable program service that they
16 would be roughly in line?

17 A I would say, I have never done the
18 numbers, but I when I look at my sheets I would say
19 no, it looks like the cable is quite a bit higher.

20 Q Okay.

21 A But I have never made a comparison of the
22 exact figures.

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1 Q You have never done that calculation?

2 A I just look at it. A lot of time you just
3 look at those sheets and it is what jumps out at you.
4 You get a sense. My sense is that it is higher.

5 Q I would ask you to turn to the document
6 that was marked as BMI Exhibit 64. It is a copy of
7 your television theme and background royalties
8 statement.

9 A Right.

10 Q For the second quarter, 1996.

11 A Right.

12 Q You ought to check in the book. It's
13 probably in there. Number 64.

14 A Oh, okay. Yes. Sixty-four, okay.

15 Q Now, is this in fact, a copy of your
16 second quarter, 1996 DB, date of background royalty
17 statement from BMI?

18 A Right.

19 Q I'd just like to ask your help in
20 interpreting this chart a little bit.

21 A Okay.

22 Q If you'll look at the second line it says

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1 America on Wheels Car Wars. That's the series and the
2 episode name of a program that ran on PBS, correct?

3 A Car Wash, right.

4 Q And if you look in the third column in the
5 middle of the page it says, "performances: number and
6 source". Now, number it says 347. Is it accurate as
7 you stated before, that that means 347 stations ran
8 that program -- PBS stations ran that particular
9 program in that particular quarter?

10 A Right. That's my understanding of what
11 this sheet means.

12 Q So that essentially, each of the roughly
13 350 published television station affiliates around the
14 country ran this program once during that quarter,
15 correct?

16 A Right.

17 Q Now, I'd like you to turn your attention
18 a few lines down to the series entitled "Biography"
19 and "Mae West", etc.?

20 A Right.

21 Q Now, this is a documentary program that
22 ran on A&E, correct?

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1 A Right.

2 Q And A&E is a cable television network?

3 A Right.

4 Q Now, under number of performances it says,
5 "2". Now, does that mean that only two of the
6 thousands of cable system operators around the country
7 affiliated with A&E carried that program during the --

8 A Yes. Now, this could be -- see, the
9 reason it's -- this could have been something that was
10 released earlier and then that particular year or this
11 particular quarter it was picked up as maybe a special
12 in one or two cities. I'm assuming that that's what
13 that means.

14 Q Well, if you look at HBO, the Multiple
15 Personality Disorder, again, the number of
16 performances is two. Is that the same thing; that
17 only two of the thousands of HBO system operators
18 around the country carried that particular HBO
19 program?

20 A I assume so.

21 Q But you're not sure?

22 A No, I'm not sure.

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1 Q Isn't it true that in the cable industry,
2 the way the industry works is their national program
3 service distributed its signal across a whole range of
4 affiliated cable system operators and direct broadcast
5 operators around the country at any given time, right?

6 A I have no idea.

7 Q Well, you know --

8 A I'm sorry, I really don't know anything
9 about --

10 Q So you're not aware that individual cable
11 program services only -- or rather, generate their
12 signal to all of their affiliates at any given point
13 in time?

14 A No.

15 Q Is it your understanding that the same
16 program that runs on HBO at 8 o'clock will run at 8
17 o'clock in Los Angeles on the same day?

18 A I have no idea.

19 MR. WEISS: I have no further questions at
20 this time.

21 CHAIRPERSON GRIFFITH: Any redirect?

22 MR. WEISS: Oh, excuse me, I do. I

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1 apologize. I have one other line.

2 JUDGE GULIN: Were you offering this into
3 evidence -- 20X?

4 MR. WEISS: Yes. I assume there's no
5 objection from BMI?

6 MR. KLEINBERG: No objection.

7 CHAIRPERSON GRIFFITH: All right. It will
8 be received; PBS Exhibit 20X.

9 (Whereupon, the above-referred
10 to document was received into
11 evidence as PBS Exhibit 20X.)

12 BY MR. WEISS:

13 Q Your licensing relationship with BMI is
14 non-exclusive, correct?

15 A Yes.

16 Q That means that you're free to enter into
17 licensing arrangements with public television
18 producers, commercial television producers -- with any
19 producer to grant them directly the performing rights
20 to the music that you compose, correct?

21 A Correct.

22 Q So for instance, if you were dissatisfied

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1 with the royalties you were receiving from BMI in
2 relation to public television performances, there's no
3 reason to stop you from going out and trying to work
4 out your own deal on these performing rights with a
5 public television producer, is there?

6 A As far as I know. That would make sense.

7 Q Have you ever chosen to do so?

8 A No.

9 MR. WEISS: I have no further questions.

10 CHAIRPERSON GRIFFITH: All right.

11 Redirect?

12 REDIRECT EXAMINATION

13 BY MR. KLEINBERG:

14 Q I have a question for you, Mr. Bacon. Mr.
15 Weiss asked you about whether you get to retain
16 publishing royalties from BMI with respect to PBS
17 programs, and you say sometimes you do and sometimes
18 you don't, is that correct?

19 A Right.

20 Q How about, has there been a trend in the
21 last five years with respect to WGBH in terms of
22 whether they have let you keep the publishing

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1 royalties?

2 A Yes. The -- I think it was several years
3 ago they -- that became part of the deal with GBH;
4 that they would retain publishing.

5 Q They took the publishing that you formerly
6 had?

7 A Right. In my cases, yes.

8 Q And this Teddy Roosevelt that we saw the
9 example of, who got the publishing rights for that
10 music?

11 A WGBH Music.

12 MR. KLEINBERG: Let me have marked as the
13 next exhibit -- yes. Oh, I'm sorry.

14 CHAIRPERSON GRIFFITH: It will be marked
15 for identification as BMI Hearing Exhibit 2.

16 (Whereupon, the above-referred
17 to document was marked as BMI
18 Hearing Exhibit No. 2 for
19 identification.)

20 BY MR. KLEINBERG:

21 Q Mr. Bacon, is this the music cue sheet for
22 the Teddy Roosevelt show that you did the music for?

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1 A Yes, it is. This is the one that's
2 submitted. Yes.

3 Q And under the "writer" column, your name
4 appears, is that correct, as the composer?

5 A Right.

6 Q And under the "publisher" column, could
7 you identify who the publisher is?

8 A WGBH Music - B Corp.

9 Q And the name of your publishing company is
10 what?

11 A MIMSA Music.

12 Q So in this case, WGBH took the publisher's
13 share of BMI royalties?

14 A Right.

15 Q And they received them directly from BMI?

16 A Yes, as far as I know.

17 MR. KLEINBERG: No further questions for
18 the witness.

19 CHAIRPERSON GRIFFITH: All right.

20 JUDGE GULIN: Mr. Bacon, I have a few
21 questions. You were asked by Mr. Weiss, when you know
22 you're going to receive less money in royalties on the

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1 back end from BMI, would you tend to ask for more
2 money up-front, or up-front fees? Now, you know
3 you're going to get less from BMI when you do work for
4 PBS. Do you in fact, ask for more money up-front than
5 you would ordinarily ask from a commercial station?

6 THE WITNESS: Well, that might sort of
7 make sense, but the reality is you pretty much try to
8 keep your up-front fees as high as possible at all
9 times. And the back-end is a factor but I don't think
10 it's a significant factor.

11 JUDGE GULIN: Were you successful in
12 keeping your up-front fees higher --

13 THE WITNESS: Well, as my reputation has
14 grown my rates per hours of scoring have gone up.

15 JUDGE GULIN: I mean, vis-a-vis,
16 commercial television? Have you been more successful
17 attempting to keep your rates higher in up-front fees
18 with PBS as opposed to commercial?

19 THE WITNESS: Not necessarily.

20 MR. KLEINBERG: I would offer into
21 evidence, BMI Exhibit 2.

22 MR. WEISS: No objection. A couple of

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1 other questions. I only have --

2 CHAIRPERSON GRIFFITH: Exhibit 2 is
3 received.

4 (Whereupon, the above-referred
5 to document was received into
6 evidence as BMI Exhibit 2.)

7 MR. WEISS: I only have one copy but I'd
8 like to mark as PB Exhibit 21X a cue sheet from
9 another episode the American Experience, "Daley, The
10 Last Boss", produced by WGBH, broadcast originally in
11 1996.

12 Your Honors, with your permission I'll
13 show this document to the witness and later we'll
14 provide copies for counsel. This is a document that
15 was produced to us by BMI in the course of discovery
16 in this proceeding.

17 MR. SCHAEFFER: No objection.

18 (Whereupon, the above-referred
19 to document was marked as PB
20 Hearing Exhibit No. 21X for
21 identification.)

22 BY MR. WEISS:

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1 Q Mr. Bacon, do you recognize this as the
2 cue sheet for the episode of "Daley, The Last Boss"
3 from American Experience?

4 A Right. Yes.

5 Q And on the publisher line there are a
6 number of items listed. MIMSA Publishing Company?

7 A Right.

8 Q And that's your publishing company?

9 A Right.

10 Q So that WGBH didn't name itself the
11 publisher. You named yourself the publisher in that
12 episode of the program, correct?

13 A Probably -- yes, definitely. I would
14 assume that this, since it was an outside producer it
15 wasn't specifically done for GBH.

16 Q And the date of that is 1996 as well? The
17 data of the program?

18 A I believe so, yes.

19 Q Now in recent months, have you also
20 modified your deal with WGBH -- your standard deal --
21 in other ways as well?

22 A Yes, we've -- recently we've talked about

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1 if we ever did a CD, if I would participate in some of
2 the royalties for that.

3 Q And is it the intention of WGBH to do a CD
4 inserting the music that you've composed for
5 programming that they've produced?

6 A Well, we've talked about it. There are a
7 lot of problems with that; namely because of the
8 American Federation of Musicians costs that would be
9 involved if they did a sampling of a lot of different
10 music I've written. It could involve 60 or 70
11 musician's payments. So I think they would like to
12 but I'm not sure the reality -- if the Musician's
13 Union would allow it.

14 Q Is it your understanding that if in fact,
15 this project takes it will apply not only to music you
16 compose in the future for WGBH programs but
17 retroactively to any of the music that you've composed
18 in the past as well?

19 A Yes, I would assume so.

20 MR. WEISS: No further questions, Your
21 Honor.

22 MR. SCHAEFFER: I have a couple.

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CROSS EXAMINATION

BY MR. SCHAEFFER:

Q Are you familiar with other songwriters?

A Sure.

Q You must know lots of them?

A Yes.

Q Do you consider yourself one of the more successful songwriters or musician composers at the present time, working and selling stuff to broadcasting?

A Well, as a composer I consider myself successful; as a songwriter I don't.

Q Are there a number of composers and songwriters who, in your opinion, try to sell and occasionally sell, to public broadcasting, that don't make as much money as you do?

MR. WEISS: Objection. I'm not sure that this witness has been qualified to answer that question at this point in time.

CHAIRPERSON GRIFFITH: Mr. Schaeffer?

MR. SCHAEFFER: Well, I think -- I'll be glad to voir dire him, but it seems to me the person

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1 who's here -- he's been a songwriter and in the
2 composing business for many years; that's been
3 established. He sells his songs, he's been part of a
4 musical group. Who better would you ask what's going
5 on in the songwriting, musical, and composing business
6 than a songwriter who's being deposed.

7 JUDGE GULIN: You need to lay a foundation
8 as to what knowledge he has about --

9 CHAIRPERSON GRIFFITH: Wait --

10 MR. WEISS: If I just may, Your Honor. I
11 think what he's asking for is the mindset of somebody
12 else whose mind he's not in. So he can't possibly lay
13 a foundation unless he can establish that this
14 gentleman knows ESP; that he has knowledge of somebody
15 else's mindset.

16 In addition, the only knowledge he could
17 have would by definition be hearsay, because it would
18 be a statement made by somebody else.

19 MR. SCHAEFFER: I'll withdraw the
20 question.

21 CHAIRPERSON GRIFFITH: Thank you; that
22 solves that. Anything further?

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1 MR. KLEINBERG: No.

2 CHAIRPERSON GRIFFITH: Mr. Bacon, you may
3 step down, sir. You're free to go. Thank you very
4 much.

5 THE WITNESS: Thank you.

6 CHAIRPERSON GRIFFITH: Mr. Kleinberg, you
7 don't object to 21X?

8 MR. KLEINBERG: Oh, I'm sorry.

9 CHAIRPERSON GRIFFITH: You have no
10 objection to Exhibit 21X?

11 MR. KLEINBERG: No, I don't.

12 CHAIRPERSON GRIFFITH: Okay, fine. It's
13 admitted.

14 MR. SALZMAN: For our next witness, BMI
15 will call Roy Epstein. A very brief part of his
16 examination I think, can be on the public record if
17 that's appropriate. The body of his examination I
18 think, will be back in the executive session.

19 MR. SCHAEFFER: Well, we'll leave it --

20 CHAIRPERSON GRIFFITH: Pardon me?

21 MR. SCHAEFFER: We're not going to bring
22 anybody in. Let it stay in the executive session.

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1 MR. WEISS: Your Honors, if I may, I will
2 have some brief voir dire of this witness at an
3 appropriate moment.

4 CHAIRPERSON GRIFFITH: All right. Mr.
5 Epstein, if you'll raise your hand to be sworn, sir?
6 WHEREUPON,

7 ROY EPSTEIN
8 a witness, was called by the counsel for Broadcast
9 Music, Inc. and, having been first duly sworn, assumed
10 the witness stand, was examined and testified as fol-
11 lows:

12 VOIR DIRE EXAMINATION

13 BY MR. SALZMAN:

14 Q Please tell the panel your name, sir.

15 A Roy Epstein.

16 Q And what is your occupation?

17 A I'm an economist.

18 Q By whom are you presently employed?

19 A My firm is called Analysis Group
20 Economics. It's a consulting firm headquartered in
21 Cambridge, Massachusetts.

22 Q Do you hold a particular title at Analysis

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1 Group?

2 A Yes. I'm a vice president.

3 Q And how long have you been at Analysis
4 Group?

5 A I started there in October 1993.

6 Q Can you tell the panel your educational
7 qualifications?

8 A I have an undergraduate degree from
9 Wesleyan University in Connecticut, and I have a Ph.D.
10 in Economics from Yale.

11 Q Is there any particular sub-field of
12 economics in which you specialize?

13 A I'd say generally I specialize in
14 quantitative areas, sometimes known as econometrics.

15 Q Prior to coming to Analysis Group, where
16 were you employed?

17 A From 1989 to 1993 I was employed at
18 Lexecon, Incorporated, which is a similar kind of
19 consulting firm in Chicago. And prior to that I was
20 on the faculty at the University of Illinois at
21 Chicago, in the Economics Department.

22 MR. SALZMAN: I tender Dr. Epstein as an

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1 expert in Economics and Econometrics.

2 CHAIRPERSON GRIFFITH: Do you want to voir
3 dire?

4 MR. WEISS: Yes. Thank you, Your Honor.

5 VOIR DIRE EXAMINATION

6 BY MR. WEISS:

7 Q Mr. Epstein, would you turn to the first
8 page of your testimony?

9 A Yes.

10 Q You say that your assignment in this
11 matter is to -- and I'm reading from the bottom
12 paragraph, fourth line from the bottom -- "explain the
13 basis for Lexecon's findings regarding total minutes
14 of music and BMI's share of music".

15 Why do you refer to these findings as
16 Lexecon's findings instead of your own?

17 A Well, it was a study that was completed by
18 Lexecon.

19 Q You were not involved in completing this
20 study?

21 A I was involved in the conception of the
22 study; I was not involved in the completion of the

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1 study.

2 Q So at the time this study was carried out
3 by Lexecon you were no longer employed by Lexecon,
4 correct?

5 A Well, no. I was involved at the beginning
6 when the study was designed and the initial work was
7 being undertaken.

8 Q But certainly by the time it was concluded
9 you had gone, correct?

10 A That's correct.

11 Q You said that you left for Analysis Group
12 in -- was in October of 1993?

13 A Yes.

14 Q And I believe your testimony is that this
15 study was carried out by Lexecon in 1993 and 1994?

16 A That's correct.

17 Q You have no idea, do you, of how many
18 drafts of the Lexecon study were presented to BMI
19 before it was finalized?

20 A I do not, no.

21 Q You don't know what particular questions
22 Lexecon asked BMI or vice versa, concerning issues

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1 about the data that was being collected for the
2 methodology of the study that was being conducted?

3 A Well, I think I have -- I have a lot of
4 information about the methodology because a lot of the
5 methodology was my own design.

6 Q But that's not my question. You don't
7 know what questions Lexecon asked of BMI or BMI asked
8 of Lexecon relating to the methodology or the data
9 collection efforts, do you?

10 A Some, because a lot of those discussions,
11 including the initial discussion of the data, began
12 while I was still at Lexecon. But it's true that
13 there were some discussions after I left.

14 Q You don't know what revisions, if any, BMI
15 made to this study before it was finalized, do you?

16 A I don't know what revisions you might be
17 thinking of.

18 Q Any revisions? You don't know whether
19 there were or weren't any revisions suggested by BMI,
20 do you?

21 A That's correct.

22 Q You don't know what specific suggestions

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1 Lexecon may have made to BMI regarding aspects of this
2 study that BMI may or may not have accepted, do you?

3 A I do not.

4 Q Is it typical in your experience as an
5 economist for someone to testify about a study that
6 some other economists ultimately completed and
7 presented to the client?

8 MR. SALZMAN: If it please the panel, let
9 me object at this point. It seems to me that while
10 this is perfectly appropriate as cross examination at
11 such time, at this point as I understand it, I was
12 tendering this person as an expert and I believe his
13 qualifications as an expert able to offer opinions in
14 economics is without question, and Mr. Weiss has gone
15 beyond that at this point.

16 CHAIRPERSON GRIFFITH: Mr. Weiss?

17 MR. WEISS: I'm asking as to whether this
18 expert is qualified to give testimony as to this
19 particular study that he's sponsoring. And I think
20 it's perfectly appropriate for voir dire, and before
21 he goes into the details I'd like to finish this
22 examination, at which point I will move to strike his

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1 testimony and ask Your Honors for a ruling.

2 CHAIRPERSON GRIFFITH: Do you have any
3 comments?

4 Well, the objection is overruled.

5 BY MR. WEISS:

6 Q Can you answer my last question, Mr.
7 Epstein?

8 A Could you repeat the question?

9 Q Is it typical in your experience for an
10 economist to sponsor through testimony, a study that
11 that economist did not oversee completion himself and
12 did not present to the client on whose behalf it's
13 being presented?

14 A I don't know that I can say what's typical
15 or not. I think it's -- to my mind it makes sense to
16 review work that's been carried out along established
17 principles and try to explain what those principles
18 were.

19 Q Have you ever presented a study through
20 testimony, that was completed by another economists
21 and that was presented by that other economist to the
22 client on whose behalf it was being offered?

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1 A I have not. This is my first episode as
2 a sworn witness.

3 Q Are other experts, other economists with
4 whom you are affiliated in Analysis Group in the
5 practice of giving testimony about studies that they,
6 themselves did not complete, and they, themselves did
7 not present to the client on whose behalf it was being
8 offered?

9 A I don't know how to answer that. We have
10 a company with about 90 people and I don't really know
11 the activities of all my associates.

12 Q Can you think of any other circumstance in
13 which such testimony was given by one of those 90
14 economists?

15 A I can't think of circumstances exactly
16 analogous to what I was asked to do here, but I don't
17 know whether something similar might have happened in
18 a different kind of proceeding. I don't know.

19 Q Is it accurate to say that developing your
20 testimony in this proceeding, you looked at the
21 conclusions from somebody else's work -- you looked at
22 the study conducted by somebody else -- and tried to

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1 draw conclusions from that?

2 A I don't know if I'd agree with that. What
3 I was asked to do was to review the consistency of the
4 methodology used by Lexecon in light of my role in
5 designing the study, and to determine whether the
6 conclusions presented by Lexecon were consistent with
7 the methodology that I originally set out. And in
8 that capacity I felt prepared to offer an opinion.

9 Q So what you did was, you in essence looked
10 at Lexecon's conclusions, decided whether they were
11 consistent with what you thought the conclusions
12 should be based upon your work early in the project,
13 and that's what you're presenting here on the witness
14 stand?

15 A Well -- I was reviewing the methodology
16 adopted by Lexecon as applied to the data to -- and
17 the results, the numerical answer at the end, was not
18 preordained.

19 Q Who was the person at Lexecon principally
20 responsible for overseeing the execution and creation
21 of this study in the final analysis that you
22 presented?

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1 A The person at Lexecon who had overall
2 direction for this project was Lisa Landes.

3 Q Would you agree that perhaps Ms. Landes is
4 the individual who might be most qualified to testify
5 about the conclusions contained in her study?

6 A I don't know whether -- you're asking
7 whether she would agree?

8 Q I'm asking whether you agree, first.

9 A I don't think so. Lisa asked me to take
10 charge of designing the statistical methodology in
11 this. That was my responsibility.

12 Q Did she ask you to oversee the complete
13 execution of the study?

14 A No, she did not.

15 Q Did she ask you to oversee the conclusions
16 that Lexecon reached from the study?

17 A She asked me to design a set of
18 statistical procedures that could be applied to the
19 data to reach a conclusion.

20 Q She asked you before you left Lexecon,
21 correct?

22 A That's right.

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1 Q So any work that happened after you left
2 from 1993, continuing then as the project exists
3 through 1994, was work that she probably didn't ask
4 you to do, correct?

5 A After my departure, that's certainly true.

6 Q So certainly, wouldn't you agree that any
7 aspect of this study conducted after your departure,
8 Ms. Landes would be eminently more qualified to
9 testify to than you are?

10 A I some respects, yes, but in other
11 respects I would say that they continued to use the
12 methods that I laid out before I left.

13 Q Why isn't Ms. Landes testifying in this
14 proceeding today?

15 A I don't know, other than that I've heard
16 that Lexecon had an assignment that conflicted with
17 their being here today.

18 Q They had an assignment that conflicted
19 with their being here today? Does that mean that
20 nobody from Lexecon was available at the time, back in
21 September, when these written testimonies were being
22 drafted, to actually write that testimony?

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1 A I don't know the detailed reasons why
2 somebody from Lexecon was not asked to comment on the
3 study.

4 MR. WEISS: Your Honors, I would move to
5 strike this witness' testimony. I don't believe he's
6 qualified to testify as to the study on which he's
7 sponsoring it.

8 MR. SALZMAN: May I --

9 JUDGE GULIN: Let me just first ask Mr.
10 Weiss this. Have you moved to strike this witness
11 prior to today?

12 MR. WEISS: No, we have not, Your Honor.

13 JUDGE GULIN: Can you tell me why not?

14 MR. WEISS: Frankly, based upon reading
15 his testimony and preparing for his cross examination,
16 it first came to light to us in detail as to the
17 involvement that he had in creating the study. It was
18 never something that we focused on frankly, prior to
19 preparing for his cross examination.

20 And as Mr. Rich whispered to me, we also
21 wanted to hear the voir dire answers to see what
22 results we heard from him. I think based upon the

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1 answers he's given he's clearly not an appropriate
2 witness to sponsor this particular study.

3 JUDGE GULIN: All right. Mr. Salzman?

4 MR. SALZMAN: Yes. First, Your Honor, I
5 would point to Rule 251.47(f) which says that parties
6 may not raise objections that were apparent from the
7 face of a written case that could have been raised
8 before the hearing without leave from the CARP Panel.

9 Beyond that, I would submit that I'd like
10 to ask a few more question since I didn't ask any
11 questions about the Lexecon study at all in voir dire,
12 to further the record on this point before the Panel
13 rules, unless the Panel is prepared to make a ruling.

14 CHAIRPERSON GRIFFITH: All right. We --
15 just a moment.

16 You want to ask a few more questions, you
17 say, before we rule? Go ahead.

18 MR. SALZMAN: Yes. Thank you.

19 BY MR. SALZMAN:

20 Q You expected to testify here today about
21 a study that was designed while you were at Lexecon,
22 correct?

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1 A Yes.

2 Q And who was it who designed that study?

3 A I think it's fair to say that I had
4 primary responsibility for designing the statistical
5 methodology that would be used.

6 Q And did there come a time when you were
7 asked by BMI to look at the results of the Lexecon
8 study?

9 A Yes.

10 Q When was that?

11 A Well, there's a little bit of a history.
12 I left Lexecon in 1993, but then in 1996 I believe,
13 BMI approached me at Analysis Group to ask me to look
14 at this study because BMI was contemplating
15 undertaking a new study of music on local television,
16 and to carry on the work that started at Lexecon.

17 So I had the study in my possession from
18 sometime in 1996. It was then last year that Mr.
19 Salzman called me and informed me about this
20 proceeding and asked me if I'd be prepared to offer an
21 opinion. And so I actually had the study for sometime
22 over a year before preparing this testimony.

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1 Q And have you had an opportunity to verify
2 the results and conclusions reached by Lexecon in this
3 study?

4 A Yes, I have.

5 Q How did you go about doing that?

6 A I had a copy of the computer program used
7 by Lexecon to generate its results. I reviewed that
8 program which embodied the mathematical formulas and
9 approaches that are described in my report, and I
10 verified that the program carried out the calculations
11 that I had originally intended the study to contain.

12 And in addition, I had copies of the input
13 data that were then processed by the program to arrive
14 at the ultimate conclusions and I was able to
15 reproduce the results that Lexecon put forward using
16 the input data.

17 MR. SALZMAN: I submit on that basis, Your
18 Honor, that the witness should be allowed to testify
19 about the study.

20 CHAIRPERSON GRIFFITH: Do you have any
21 cross?

22 BY MR. WEISS:

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1 Q Did you oversee the collection of the data
2 that went into that input?

3 A I did not, no.

4 Q Do you know how it was collected, in
5 particular?

6 A I know in general how it was collected; I
7 do not know what you mean by "in particular".

8 Q You were not involved in any way in the
9 process for the collection of that data?

10 A I was not personally, no.

11 Q So you can't vouch in any way for the
12 accuracy of the underlying data that forms the basis
13 of the study, can you?

14 A I cannot. I believe Lexecon also said
15 they could not. The data came from BMI's collection
16 efforts.

17 CHAIRPERSON GRIFFITH: All right. The
18 objection is overruled. First, we do not believe that
19 the objection was timely. Secondly, he is qualified
20 to testify as an expert in the field of economics.
21 The extent to which he testifies to this particular
22 issue, the panel will go to the weight of his

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1 testimony as opposed to your position, Mr. Weiss, that
2 he be disqualified.

3 MR. WEISS: Thank you, Your Honor.

4 CHAIRPERSON GRIFFITH: All right. Go
5 ahead, please.

6 MR. SALZMAN: Thank you. As they say in
7 the music business, let's take it from the top.

8 DIRECT EXAMINATION

9 BY MR. SALZMAN:

10 Q While you were employed by Lexecon, did
11 there come a time when Lexecon was commissioned by BMI
12 to carry out a study of music use on local, commercial
13 television?

14 A Yes.

15 Q What involvement did you have in that
16 study?

17 A I was asked by Lisa Landes of Lexecon to
18 take the lead in designing a suitable, statistical
19 methodology to analyze the data to determine the music
20 use on local television.

21 Q For purposes of this study, what did you
22 consider to be local television programming?

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1 A For this study local television was
2 programming shown on television stations that did not
3 originate with the three major networks or PBS.

4 Q Did BMI have data which you at Lexecon
5 were to use as to the performances of particular
6 programs and the music contained in those programs?

7 A Yes. BMI has a very large database that
8 contains the music use of a very large number of
9 programs. But there were certain gaps in the data
10 which resulted in the study being undertaken.

11 Q On what period of time is the study
12 focused?

13 A The study examined two separate years:
14 1991 and 1992.

15 Q What did the study consist of?

16 A The study had four phases, if you will.
17 In the first instance a sample of unidentified
18 performances was drawn. That is it say, Lexecon
19 identified performances on local television for which
20 music information was not available from the BMI
21 database.

22 BMI was then to take that list of

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1 performances and attempt to obtain music information
2 for them by various research methods.

3 Third, the music information collected
4 would then be processed using the statistical
5 methodology to make an inference from the sample to
6 the universe of unidentified performances as a whole.

7 And finally, the information from the BMI
8 database on the identified performances would be
9 combined with the sample information to arrive at a
10 bottom-line inference about total music use and the
11 share of BMI music.

12 Q Do I understand from your answer that as
13 the last step of these four steps you took the data
14 that BMI had for -- already existing data for the
15 broadcasts it already knew about and then combined
16 that with the inferences you drew as to the previously
17 unidentified programs?

18 A That's right. A large part of -- I don't
19 recall the exact proportions -- but a large component
20 of the information came from the information BMI had
21 on hand and it was supplemented by the sample results.

22 Q And what statistical method did Lexecon

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1 use to do its sample as to the unidentified
2 broadcasts?

3 A Well, I think generally it would be termed
4 in statistics, the analysis of a stratified sample
5 design. The principles of this type of design would
6 be expounded in any number of statistics textbooks.

7 Q Turn if you would, to your written
8 testimony. Do you have it in front of you?

9 A Yes.

10 Q Having reviewed that written testimony, is
11 there anything in it that you've noticed that need
12 correction?

13 A Yes. In reviewing my testimony the other
14 day I noticed an addition mistake on page 5.

15 Q Would you please point that out for us?

16 A Yes, in Table 2 I noticed that the line 3
17 of the table labeled, "number of cue sheets", the
18 total of 3425 is clearly incorrect. It should be --
19 the total should be the sum of 2020 and 1725. So the
20 correct total should actually be 3745.

21 Q Is there anything else that you noticed in
22 the report that needs revision?

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1 A Yes. I noticed a small typo.

2 Q Can you point that out for us?

3 A Yes, I'm trying to find it. On page 12,
4 the formula at the top of the page. I recognize this
5 is a detail, but, there is an expression in square
6 brackets and there's a variable, $BMISH_s$. There should
7 also be a superscript, capital U. So there's a
8 missing superscript, capital U.

9 MR. KLEINBERG: I knew that.

10 CHAIRPERSON GRIFFITH: You did?

11 MR. SALZMAN: He said he did.

12 JUDGE GULIN: This is at page 12?

13 THE WITNESS: Page 12.

14 JUDGE GULIN: Formula at the top?

15 THE WITNESS: Formula at the top. Within
16 the big, square brackets there's a variable called --

17 JUDGE GULIN: Oh, I see it.

18 THE WITNESS: -- $BMISH$, and that should
19 have a superscript U as well as a subscript "s".

20 MR. RICH: You stole Mr. Weiss' cross
21 examination.

22 BY MR. SALZMAN:

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1 Q Can you tell us the results of the Lexecon
2 study?

3 A Well, the bottom-line results are on page
4 13, Table 3.

5 Q Can you bring us home to what you consider
6 to be the critical conclusions?

7 A I think the main conclusion is toward the
8 bottom of the table which shows that in 1991 BMI was
9 estimated to have a share of 42.8 percent of the music
10 on local television. In 1992 the share is estimated
11 to be 45.4 percent.

12 The bottom number in the table labeled
13 "standard error" is the standard statistical measure
14 of reliability, and it says that in 1991 the standard
15 error was 2.4 percentage points and in 1992 was 2.2
16 percentage points. So if you go below the standard
17 error is a plus or minus factor on the results.

18 Q What was the unit of measurement for this
19 music usage study? In other words, how is the music
20 counted?

21 A Music for purposes of this study was
22 measured as total minutes of music. There was no

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1 distinction made for use of the music.

2 Q Have you had the opportunity to verify the
3 accuracy of this report -- of these conclusions in the
4 Lexecon study?

5 A Yes, in the sense that I took the input
6 data used by Lexecon and the program used by Lexecon
7 and achieved the same results reported by Lexecon.

8 Q In connection with this proceeding, were
9 you asked to do any other economic work?

10 A No.

11 MR. SALZMAN: No further questions.

12 CHAIRPERSON GRIFFITH: Mr. Schaeffer, do
13 you have any cross examination, sir?

14 MR. SCHAEFFER: I do not.

15 CHAIRPERSON GRIFFITH: I suspect Mr.
16 Weiss, why don't we take our --

17 MR. WEISS: That's fine, Your Honor.

18 CHAIRPERSON GRIFFITH: -- morning recess?
19 We've been -- Dr. Epstein, we started at 9:30 so we'll
20 take about a 10-minute recess at this time. Thank
21 you.

22 (Whereupon, the foregoing matter went off

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1 the record at 11:02 a.m. and went back on back on the
2 record at 11:17 a.m.)

3 CHAIRPERSON GRIFFITH: Mr. Weiss.

4 MR. WEISS: Thank you, Your Honor.

5 CHAIRPERSON GRIFFITH: Excuse me. Are we
6 still in the executive session? I guess we ought to
7 shut the door. All right.

8 MR. WEISS: Thank you, Your Honor.

9 CROSS EXAMINATION

10 BY MR. WEISS:

11 Q On page 2 of your written testimony you
12 testified that the study was defined as "total minutes
13 of music (background features being some to cross all
14 performances on local television in a given year)".
15 That means that the study only examined, as you said,
16 minutes of music, is that right?

17 A That's right.

18 Q It didn't take into account the number of
19 cue or compositions that were appearing on television
20 that year?

21 A No.

22 Q And the study didn't seek to distinguish

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1 in any way between feature uses, theme uses, or
2 background uses, or any other types of uses of music
3 on television, did it?

4 A That's right.

5 Q So all minutes of music, irrespective of
6 the nature of the performance or the type of
7 performance, were treated equally for purposes of the
8 study, correct?

9 A Yes.

10 Q Source of the data from which the
11 conclusions in the Lexecon study were drawn were cue
12 sheets, right?

13 A Yes.

14 Q Now, cue sheets tend, as a rule, to
15 identify the music in feature, theme, background uses
16 of music that appear in programming, is that right?

17 A They do.

18 Q So if Lexecon wanted to it could have
19 calculated data based upon the types of performances,
20 but it chose not to, right?

21 A I don't know if Lexecon chose not to. My
22 understanding was that BMI asked Lexecon to estimate

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1 total minutes of music and that's what was done.

2 Q So it was BMI's decision not to look at
3 feature, theme, background cues as separate entities,
4 correct?

5 A I'm not sure; certainly not my decision.

6 Q Do you know if Lexecon or BMI captured
7 information from the cue sheets as to theme, feature,
8 and background and simply chose not to use it, or did
9 they just not capture it at all in the first instance?

10 A I know that at least some information on
11 music use was made available to Lexecon. I do not
12 know if that was merely an artifact of the way the
13 data are collected in the first place.

14 Q For purposes of this study, BMI tried to
15 match each program broadcast by local television
16 stations in 1992, in the first instance, to a cue
17 sheet that BMI already had in its cue sheet database,
18 is that right?

19 A Yes.

20 Q And you said BMI didn't have cue sheets
21 for a large percentage of the programs, is that right?

22 A On local television, yes.

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1 Q On local television.

2 A Yes.

3 Q This was only a study of local television,
4 right?

5 A That's right.

6 Q It had nothing to do with cable
7 television?

8 A Right.

9 Q It had nothing to do with programming
10 broadcast by the major broadcast television networks?

11 A Well, not directly. The broadcasts on
12 local television might have at one time, been network
13 shows, but for the purposes of the study we're looking
14 at programs that would have been in syndication.

15 Q Well, as I understand it BMI obtained
16 program schedules from a source called TVData,
17 correct?

18 A Yes.

19 Q And it obtained program schedules for the
20 local television portion of local station dates,
21 correct?

22 A Yes.

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1 Q It did not seek to identify the programs
2 broadcast as part of the national network feed during
3 1991 and '92, did it?

4 A That's right.

5 Q Now, you said that for the programs BMI
6 had a cue sheet, the information which was used in the
7 study was taken from the cue sheets. And then for the
8 rest of the programs BMI sought to obtain cue sheets
9 that were not previously in its files, correct?

10 A Yes.

11 Q Why did that happen?

12 A Why did BMI seek to obtain cue sheets?

13 A Why did Lexecon have BMI seek to obtain
14 cue sheets for these unidentified programs which BMI
15 did not previously have in its database?

16 A Well, the purpose of the study was to get
17 as comprehensive a picture of music use on local
18 television as was possible. And because cue sheets
19 were -- there were certain types of programming where
20 the cue sheet coverage was not as good.

21 For example, local news or infomercials.
22 BMI had some cue sheets but the coverage was not very

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1 good, so the purpose of the study was to try to obtain
2 additional information on these categories to get a
3 more accurate picture of music use.

4 Q So the view from Lexecon was, unless
5 information was obtained as to these unidentified
6 programs, it would not give an accurate picture of
7 music use in local television?

8 A Well, I think in the absence of the
9 addition of cue sheets obtained from the study, the
10 information just as in BMI's own database, was a basis
11 for inferring music use, but the belief was that by
12 doing the study there would be a more accurate view.

13 Q Rather than looking to get all of the cue
14 sheets for these unidentified programs, Lexecon
15 developed a sample for which they were seeking cue
16 sheets, correct?

17 A Yes.

18 Q And that sample was -- to see if I
19 understand it -- you talk about a random sample where
20 every nth cue sheet was selected, right?

21 A Yes.

22 Q And what that means, if I understand it

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1 correctly -- tell me if I'm wrong -- is that the
2 programs identified as being broadcast during 1991 and
3 1992 were arranged in alphabetical order and then
4 every nth cue sheet from that listing was selected as
5 a cue sheet for which BMI was going to seek to add to
6 the study, correct?

7 A I don't think it was actually done in that
8 way, but you could think of all the programs being
9 written on a little slip of paper and tossed into an
10 urn and making a draw from the urn.

11 Q So they weren't arranged alphabetically,
12 they were just randomly selected and all the programs
13 that were unidentified were randomized by a computer
14 and the computer picked out every nth cue sheet from
15 the lot or every --

16 A Every performance had an equal probability
17 of being drawn, yes.

18 Q So that means that all the performances in
19 the unidentified universe were weighted equally,
20 correct?

21 A At the performance level, yes.

22 Q And the level of selecting what was going

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1 to be included from the unidentified universe, that's
2 cue sheets BMI was going to seek, correct?

3 A At the performance level, yes.

4 Q Just so that I understand, in reaching its
5 conclusions Lexecon treated all performances of
6 performances equally, right?

7 A Yes.

8 Q So that means that if a performance of a
9 program -- let's say an Oshkosh -- was seen by 20,000
10 people, that was given the same weight for purposes of
11 this study, as a program that was broadcast in New
12 York and seen by two million people, correct?

13 A That's true.

14 Q And similarly, if a program broadcast at
15 3 o'clock in the morning -- which virtually nobody saw
16 -- showed up this study, that was given the same
17 weight as a popular prime time program on a large
18 market affiliate, correct?

19 A All performances were given equal weight.

20 Q What was the "n" in the random selection
21 process?

22 A Let's see if I remember. It was on the

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1 order of -- bear with me for a minute. It was on the
2 order of one in a hundred.

3 Q How many cue sheets did Lexecon's
4 statistical approach suggest should be selected
5 through this random process?

6 A I'm not sure I understand the question.

7 Q Well, if you pick one in a hundred
8 programs, how many total number of cue sheets would
9 Lexecon have expected to collect as a result of that
10 process?

11 A Well, remember it's at the performance
12 level, so it would be one out of 100 performances.
13 Originally, Lexecon requested approximately 17,000 cue
14 sheets.

15 Q And what was Lexecon's success rate in
16 obtaining those 17,000 cue sheets?

17 A Well, I'd say it's more BMI's success rate
18 and Table -- if I may look at my report -- Table 2 in
19 my report indicates that they obtained somewhere over
20 3,000 cue sheets.

21 Q So 3,000 cue sheets out of the 17,000 that
22 Lexecon said they should see, right?

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1 A It was a target, yes.

2 JUDGE DREYFUS: Counsel, can I interrupt
3 one second --

4 MR. WEISS: Sure.

5 JUDGE DREYFUS: -- before we get too far
6 down the road into this? You stated on page 2 that
7 one performance could include three broadcasts, is
8 that correct? I mean, one performance is not one
9 broadcast?

10 THE WITNESS: Oh yes, it is.

11 JUDGE DREYFUS: It is?

12 THE WITNESS: A performance is a broadcast
13 by a station.

14 JUDGE DREYFUS: Well, this says for
15 example, M*A*S*H episode 3, episode 3 -- was that
16 three broadcasts -- just one performance?

17 THE WITNESS: No, M*A*S*H is a title that
18 has many different episodes, so for purposes of the
19 study the third episode of M*A*S*H broadcast on a
20 particular station is different from the --

21 JUDGE DREYFUS: Is one performance?

22 THE WITNESS: Is one performance.

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1 JUDGE DREYFUS: I see. Okay, thank you.

2 BY MR. WEISS:

3 Q Was BMI able to obtain a greater
4 percentage of the programs selected by Lexecon for
5 certain of the categories of programming listed on
6 page 4 of your chart, than for others?

7 MR. SALZMAN: Objection. The question is
8 garbled.

9 CHAIRPERSON GRIFFITH: The question is
10 what?

11 MR. SALZMAN: I think Mr. Weiss misspoke.
12 I think there's a word missing in the question.

13 CHAIRPERSON GRIFFITH: Do you want to
14 restate the question?

15 MR. WEISS: I'll ask the question again if
16 there's any confusion.

17 BY MR. WEISS:

18 Q Was BMI able to obtain a greater
19 percentage of the programs selected from certain of
20 the genres listed on page 4 of your testimony, than
21 from other of the genres listed on your testimony on
22 page 4?

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1 A I'm sure that's true. I'm not sure -- I
2 don't recall the exact differences in the success
3 rates. It was particularly difficult to get cue sheet
4 information on infomercials, for example. It was
5 easier to obtain cue sheet information on news.

6 So there was some types of programming
7 where even after BMI exerted its best efforts, it was
8 still difficult to come up with cue sheets.

9 Q When you saw news, is that syndicated news
10 programming or local news programming?

11 A Local news.

12 Q Okay, we can come back to it. Other than
13 those differences do you recall which of these
14 particular genres BMI was more or less successful in
15 obtaining cue sheets for through this random selection
16 process?

17 A That information is available. I just
18 don't have it handy.

19 Q Now, the Lexecon study examined music use
20 on commercial, local television stations from 1991 and
21 1992, correct?

22 A Yes.

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1 Q And other than as changes as between those
2 two years, Lexecon didn't attempt to analyze any
3 changes in music use over a broader period of time,
4 did it?

5 A No.

6 Q And as between 1991 and 1992 there was an
7 increase, according to the Lexecon study, in BMI music
8 use in broadcast television, is that right?

9 A Are you referring to the results in Table
10 13?

11 Q Yes.

12 A Well, it's -- I think there's a variety of
13 results in Table 3. Total minutes of music hardly
14 changed between the two years.

15 Q But BMI's share increased from one year to
16 the next, correct?

17 A Yes.

18 Q You have no way of knowing whether that
19 reflected a trend which continued in later years, do
20 you?

21 A I do not.

22 Q None of the analysis that Lexecon

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1 conducted tells us anything about music use on local
2 television in 1995, does it?

3 A I don't agree with that statement.

4 Q This was a study of 1991 and 1992, wasn't
5 it?

6 A Yes, but you asked me if it was the case
7 the study provided no information on music use in
8 1995.

9 Q Did the study seek to reach any
10 conclusions as to music use in 1995?

11 A No.

12 Q That was not the design of the study. It
13 was only '91 and '92?

14 A The study was based on data from '91 and
15 '92, yes.

16 Q Any conclusions one might reach for 1995
17 would have to be somewhat speculative, isn't that
18 right?

19 A If the only information base was '91 and
20 '92 there would have to be an extrapolation, yes.

21 Q So that to use this particular study to
22 analyze data in 1995, one would have to perform some

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1 kind of an extrapolation, is that right?

2 A To make a statement about 1995 when the
3 only data was 1991 and '92 would require some sort of
4 judgment or extrapolation, yes.

5 JUDGE DREYFUS: Is it possible to make an
6 extrapolation -- meaningful extrapolation -- from this
7 data when you've got 1991 and 1992, all within very
8 close to the same standard error? Can you extrapolate
9 -- I mean, is there any trend that has been
10 established from which you can extrapolate forward?

11 THE WITNESS: I think there would be
12 methods of attempting to make such an extrapolation,
13 but I did not attempt to perform on and I don't really
14 have an opinion of what the pattern in '95 -- actually
15 I don't know what the pattern in '95 was and I don't
16 have an opinion on what a reasonable extrapolation
17 might have been based on this data.

18 BY MR. WEISS:

19 Q And you were not asked by BMI or by Dr.
20 Owen to do such an extrapolation in connection with
21 this proceeding, were you?

22 A No.

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1 Q Or at any time for that matter, correct?

2 A That's right.

3 Q Now, let's talk a little bit about local
4 television programming. The local television
5 programming which is programming created by the
6 commercial local station itself, BMI in the ordinary
7 course tends to get very few cue sheets, is that
8 right?

9 A That's my understanding, yes.

10 Q And most stations in fact, tend not even
11 to create cue sheets for their local television
12 programming in the ordinary course, right?

13 A Well, I don't know. I mentioned before
14 that BMI is engaged in a new study of local television
15 where I think one of the goals is to find out whether
16 those cue sheets exist or not.

17 Q Well, BMI has never in the past, been very
18 successful in obtaining local cue sheets from local
19 television stations, have they?

20 A I believe that's true.

21 Q And you have no reason to suspect that the
22 local stations are simply withholding these cue sheets

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1 from BMI, do you?

2 A I can't say that I'm knowledgeable about
3 how the local stations create or maintain their cue
4 sheets.

5 Q Is it accurate to say that most of the
6 locally produced television programs that appeared in
7 1991 and 1992 were unidentified for purposes of the
8 Lexecon sample?

9 A Well, I think my study has a table that
10 bears on that. Table 1 on page 3.

11 Q And can you explain to me how Table 1 on
12 page 3 indicates what proportion of locally produced
13 television programs that were identified or
14 unidentified?

15 A Taking the two years together, the table
16 says that for the data used in the study about 46
17 percent of the performances were identified and the
18 balance were unidentified.

19 Q Just so that we're clear, there are
20 essentially two kinds of programs in local, commercial
21 broadcast television: syndicated programs that are
22 created by third parties and provided to the stations,

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1 and locally produced programs that are created by the
2 stations for themselves. Is that right?

3 A Yes. I'm not sure how you treat
4 infomercials in that breakdown, but --

5 Q They're again, programs created by third
6 parties and provided to the local television stations,
7 correct?

8 A That's right.

9 Q Now, is Table 1 an analysis of all local
10 television programs, included syndicated and locally
11 produced programs, or simply locally produced
12 programs?

13 A It's all programming shown on local
14 television.

15 Q So that again, my question is, as to the
16 locally produced portion of the local television
17 station's day, is it accurate that most of those
18 locally produced television programs were unidentified
19 as defined in this study?

20 MR. KLEINBERG: Sorry. Somebody's come in
21 or out. I'm not sure who it is.

22 MR. CARSON: I'm general counsel at the

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1 Copyright Office. If anyone has a problem I'll leave.

2 CHAIRPERSON GRIFFITH: We're in executive
3 session and we're just confirming who comes in and who
4 doesn't. You're welcome, I presume. Thank you.

5 THE WITNESS: Again, that information is
6 available, but I don't have it handy. For example,
7 it's true that there was limited information available
8 say, for locally originated news, but there was also
9 pretty low cue sheet coverage for talk shows. And I
10 think it -- and religious -- and I believe that
11 certainly for the talk shows they were not locally
12 produced. Religious is more of a mixed picture.

13 BY MR. WEISS:

14 Q But again, as to the locally produced
15 programs, most of those programs were unidentified for
16 purposes of the study, correct?

17 A Of the programs that actually originated
18 with the local station?

19 Q Right.

20 A That's probably true.

21 Q And by 1993 and 1994 when Lexecon was
22 conducting the study, neither BMI nor the stations had

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1 cue sheets for the programs that were broadcast in
2 1991 and 1992, isn't that right? The locally produced
3 programs?

4 A Sorry, could you restate that?

5 Q Is it not true that by 1993 and 1994 when
6 the study was being conducted, neither BMI nor the
7 local stations had cue sheets for their locally
8 produced television programs, such as their local news
9 program?

10 A I'm having trouble understanding the
11 question. I'm sorry.

12 Q Well, Lexecon conducted this study in 1993
13 and 1994, looking back at programming that ran in 1991
14 and 1992, correct?

15 A That's right.

16 Q BMI didn't have cue sheets for the most
17 part, for locally originated program such as local
18 news, did it?

19 A For what time period?

20 Q For 1991 and 1992?

21 A Well, they had some.

22 Q But the vast majority they did not have,

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1 correct?

2 A That's probably true.

3 Q And the stations themselves for the most
4 part, had not, by 1993 and 1994, created or maintained
5 cue sheets for their own locally produced programs
6 back in 1991 and 1992, isn't that also correct?

7 A I don't know.

8 Q Well, isn't it true that instead of
9 relying on information as to local news programming
10 for 1991 and 1992 in creating this particular study,
11 BMI instead, and Lexecon, sought information as to the
12 music use in local news programs in 1993 and 1994, and
13 merely extrapolated that data back to programs that
14 ran two years earlier?

15 A I don't know.

16 Q Isn't this a basic element of the study
17 that you would expect to be aware of in the ordinary
18 course?

19 A I know that in regard to local news, BMI
20 adopted what was thought to be a conservative
21 approach. If your question is concerning --

22 Q My question is a different one which is,

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1 the information in this study purports to refer to
2 music broadcast by local television stations in 1991
3 and 1992.

4 And I'm asking whether it is in fact the
5 case, that BMI and Lexecon relied on music information
6 from locally produced music programs from 1993 and
7 1994 in developing this study and simply extrapolated
8 that data back to the programs that ran in 1991 and
9 1992?

10 A Well, in the case of news -- which is what
11 I think your question is concerning --

12 Q Well, that's the principal component of
13 locally produced programming is local news
14 programming, correct?

15 A Well, it's certainly a large one. It
16 might be the principal one. For the case of local
17 news, BMI adopted what was thought to be a
18 conservative approach by knowing a few composers who
19 were affiliated with BMI who wrote local music news
20 themes. BMI knew those composers and assumed that all
21 other -- and knew the show associated with those
22 composers, and assumed that all other local news

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1 broadcasts were non-BMI.

2 Q Did BMI, in developing this study with
3 Lexecon, rely upon cue sheet data for local news
4 programs for 1991 and 1992, or rather did BMI rely
5 upon data it did obtain from 1993 and 1993 and
6 extrapolate that data back to programs running in 1991
7 and 1992?

8 A I'm not sure of the answer to that
9 question.

10 Q Do you recall attending meetings with the
11 Television Music License Committee, the industry
12 organization that represents local television
13 stations, at which this particular study was
14 discussed?

15 A Yes.

16 Q Do you recall at those meetings BMI
17 explaining precisely what I just asked? That in
18 particular, BMI relied upon data from 1993 and 1994
19 for local television news programs and extrapolated
20 that data back to 1991 and 1992, for purposes of this
21 study?

22 A I don't recall that being specifically

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1 discussed at those meetings.

2 Q You mentioned that there weren't cue
3 sheets for local programs -- locally produced programs
4 for the most part, correct?

5 A BMI did not have those cue sheets, yes.

6 Q Instead of relying on --

7 JUDGE GULIN: That's for 1991 and 1992?

8 BY MR. WEISS:

9 Q Or for 1993 and 1994 for that matter,
10 correct?

11 A Yes, BMI has limited cue sheet coverage
12 for locally produced programs.

13 Q Either for 1991 and 1992, or even for 1993
14 and 1994, the years when the study were being
15 conducted, correct?

16 A Yes.

17 Q So instead of relying on cue sheet
18 information to identify the music in locally produced
19 programming, BMI came up with a different approach for
20 identifying music, correct?

21 A I'm not sure what you mean.

22 Q Well, isn't it true that rather than

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1 looking at cue sheets because they didn't exist, BMI
2 merely called individual local television stations and
3 asked them what music they were using at that point in
4 time in their local news programming?

5 A I'm not familiar with the details of the
6 procedure used by BMI to collect the music timings and
7 so forth, that would be the basis for a cue sheet.

8 Q By "that point in time" I'm taking about
9 1993 and 1994. Is that how you understood my last
10 question?

11 A I understood the question to mean the data
12 used by the study.

13 Q Right.

14 A And I do not know the details of all the
15 procedures used by BMI to collect the music timing
16 information.

17 Q Well, you know for a fact that BMI didn't
18 rely on cue sheets for 1991 and 1992 for locally
19 produced news programming, isn't that right?

20 A I don't -- I don't know the specifics of
21 how BMI tabulated the music use information for news.

22 Q Do you know how they even collected that

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1 data, or from where?

2 A I had a general understanding that they
3 knew of a small number of composers who were BMI
4 affiliates and that on that basis they estimated BMI's
5 music minutes for news based on programs attributable
6 to those authors.

7 Q Is that part of your original methodology?

8 A The original methodology dealt with
9 statistical principles and the types of formulas
10 outlined in the back of my testimony to analyze the
11 data that would be collected. The methodology did not
12 concern the details of the data collection at the
13 level that you're discussing.

14 Q So just to be clear, you're not sure in
15 particular, whether BMI contacted their own composers
16 or individual local television stations to try to
17 identify the music in local news programs, is that
18 right?

19 A No, Lexecon -- as a general matter,
20 Lexecon relied on BMI for the music use information.
21 Lexecon itself did not undertake any independent
22 collection efforts or verification of the data

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1 provided by BMI.

2 Q So again, you don't know how the data was
3 collected as to local television news programs,
4 correct?

5 A No, that was BMI's activity.

6 Q Do you know which stations were selected
7 for purposes of collecting such information?

8 A Well, the identities of some would be
9 available if you looked through the detailed computer
10 files. I don't have that handy.

11 Q Were those the same identities as selected
12 through your random sample?

13 A I don't know the answer to that offhand.
14 That could be -- that information is available.

15 Q Do you know what questions were asked of
16 whatever the source was for the information as to
17 music use in local television news programming?

18 A I'm not sure I understand your question.

19 Q Do you know what questions were asked by
20 the people at BMI to devine what music was used in
21 local television news programs?

22 A No.

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1 Q Do you know who, at BMI, did those
2 interviews to identify the information?

3 A You mean which individuals?

4 Q Yes.

5 A No, I do not.

6 Q And you don't know who those individuals,
7 in any event, spoke to to get the information from,
8 correct?

9 A No. I heard that BMI had a large staff of
10 people trying to collect this information, but I don't
11 know who the individuals were.

12 Q You would agree, would you not, that the
13 method of obtaining data as to music and local news
14 programming, differed significantly from the method
15 for obtaining information as to other programs that
16 fell in the sample, isn't that right?

17 A That may be. I would have to say for
18 purposes of the study, BMI had expertise in collecting
19 music use data; we had expertise in analyzing data.
20 So BMI's responsibility was to collect the data.

21 Q And for purposes of your testimony today,
22 you never examined with BMI, the mechanics of their

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1 methods by which they obtained information as to music
2 among other genres locally produced news programs?

3 A That's correct.

4 MR. WEISS: I have no further questions of
5 the witness.

6 CHAIRPERSON GRIFFITH: All right. Any
7 redirect?

8 MR. SALZMAN: I do have some, thank you.

9 REDIRECT EXAMINATION

10 BY MR. SALZMAN:

11 Q The music -- Mr. Weiss referred to
12 meetings with the Television Music License Committee
13 that you attended?

14 A Yes.

15 Q Do you remember that?

16 A Yes.

17 Q And you also testified to the effect that
18 BMI is in the process currently of planning a possible
19 future music usage study, correct?

20 A Yes.

21 Q And that study is intended to be a joint
22 project, is that right?

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1 A Yes.

2 Q And you are one of the economists working
3 on that study?

4 A I am.

5 Q And on behalf of whom?

6 A For BMI.

7 Q And when we say joint project, who else is
8 part of that in addition to BMI?

9 A Well, the TV Music Licensing Committee is
10 the other party.

11 Q And has the TV Music License Committee
12 proffered up someone to work with you on the
13 methodology for that study?

14 A Yes, they have their own expert.

15 Q Who is that?

16 A Adam Jaffe.

17 Q Now, the Lexecon study that you testified
18 about, I believe you testified that the data
19 collection effort for that was done by BMI and not
20 Lexecon at all, correct?

21 A Yes.

22 Q What were the sources of data that BMI

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1 used, generically?

2 A Well, in the first instance, BMI relied on
3 its own cue sheet database, which accounted for about
4 half the performances. And in addition, in
5 identifying a sample of unidentified performances to
6 examine, BMI has access to a commercial source called
7 TVData, which basically tracks every broadcast by
8 every TV station through the country.

9 And the TVData tapes were the basis for
10 drawing the sample that we've talked about. The
11 performances drawn from the TVData tapes were then
12 researched by BMI to obtain cue sheets, or in some
13 instances by directly reporting programs and trying to
14 measure timings off recordings.

15 Q Is it your understanding that in the
16 ordinary course of business BMI attempts to obtain cue
17 sheets from area sources?

18 A Yes.

19 Q They have a department exclusively devoted
20 to that?

21 A I believe it's one of BMI's main business
22 purposes; to collect as much cue sheet information as

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1 possible.

2 Q Are you familiar with a man named Fred
3 Willms?

4 A Yes.

5 Q Do you have any understanding as to
6 whether one of the things he oversees is that cue
7 sheet data collection?

8 A I don't know the exact nature of his
9 responsibilities, but I've certainly discussed it with
10 him.

11 Q And in collection with the Lexecon study,
12 do you have any understanding as to what role he or
13 his people had in accumulating the cue sheet
14 information with respect to local programming?

15 A Well, in the most general sense, BMI had
16 complete responsibility for collecting the cue sheet
17 information.

18 MR. SALZMAN: No further questions.

19 CHAIRPERSON GRIFFITH: All right. Do you
20 have recross?

21 MR. WEISS: A few limited questions.

22 RECROSS EXAMINATION

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1 BY MR. WEISS:

2 Q You mentioned that you're currently
3 involved in a joint project with the economist from
4 the Television Music License Committee to analyze
5 music use in the local television industry, correct?

6 A Yes.

7 Q Isn't it true that one of the reasons that
8 that joint project is being undertaken is that the
9 Television Music License Committee rejected the
10 results of BMI's study as to which you're testifying
11 today?

12 A I don't know -- I did not know that.

13 Q Dr. Jaffe who you mentioned, is involved
14 with you in the current project with the Television
15 Committee, correct?

16 A Yes.

17 Q He had no involvement in the Lexecon study
18 that's being presented as part of your testimony here
19 today, correct?

20 A That's right.

21 Q And no element of that joint study which
22 has not been completed --

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1 A May I expand my previous answer? I was
2 told that Adam Jaffe reviewed the Lexecon study
3 sometime after it was completed and before I was
4 involved.

5 Q And he didn't adopt it as his study, did
6 he?

7 A He didn't adopt it as his study. I'm not
8 aware of any objections he raised at the time, either.

9 Q In any event, nothing that you're
10 presenting in your testimony here reflects any work
11 reflected by Dr. Jaffe does it?

12 A That's right.

13 Q If the information as to music and local
14 news programs which was collected by BMI was not
15 collected randomly, would you agree that this calls
16 into question the accuracy of the results of this
17 study that you're sponsoring?

18 A No.

19 Q If that music information as to local news
20 programs was not randomly selected you don't think
21 that the results are called into question in any way?

22 A No. Let me give you an example. Suppose

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1 BMI were successful in collecting music use
2 information for every single broadcast of local news.
3 It wouldn't be a sample anymore, it would be a
4 complete census. That would be the best.

5 Q Was BMI successful in collecting for every
6 local news program that was identified in 1991 and
7 1992?

8 A No, but what I am trying to say is that
9 the study is not necessarily invalidated by the
10 suggestion that you've made.

11 Q Because it's conceivable that all the cue
12 sheets were collected for all the programs and
13 therefore it wouldn't be biased?

14 A It's certainly conceivable that the data
15 collection that was undertaken did not introduce a
16 bias.

17 Q What percentage of local station
18 programming is occupied by local news programming?

19 A I don't know the exact number, but it's a
20 good-sized fraction.

21 MR. WEISS: I have no further questions,
22 Your Honor.

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1 CHAIRPERSON GRIFFITH: All right. Any
2 further questions?

3 MR. SALZMAN: Nothing, Your Honor.

4 CHAIRPERSON GRIFFITH: All right. Dr.
5 Epstein, you may step down, sir. You're free to go.
6 Thank you very much.

7 THE WITNESS: Thank you.

8 CHAIRPERSON GRIFFITH: All right.

9 MR. KLEINBERG: Your Honor, that completes
10 BMI's direct case. I have one, I guess housekeeping
11 matter which is Dr. Owen's charts from the other day.
12 We failed to mark them. I guess we should mark as
13 hearing exhibits, just so that they're part of the
14 record, I guess.

15 CHAIRPERSON GRIFFITH: And are you
16 offering them into evidence, or do you want them
17 marked simply for identification?

18 MR. KLEINBERG: Well, I guess I'll offer
19 them into evidence since he testified about them in
20 the course of his testimony.

21 MR. RICH: Could I see the second one,
22 please? We have no objection.

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1 CHAIRPERSON GRIFFITH: All right. They'll
2 be received as BMI Hearing Exhibit Number 3.

3 (Whereupon, the above-referred
4 to document was marked as BMI
5 Hearing Exhibit No. 3 for
6 identification and admitted
7 into evidence.)

8 MR. KLEINBERG: Oh, I meant to offer BMI
9 Exhibit 1 into evidence.

10 JUDGE GULIN: Hearing Exhibit 1?

11 MR. KLEINBERG: Yes.

12 CHAIRPERSON GRIFFITH: All right. That
13 concludes BMI's direct case. Is that correct?

14 MR. KLEINBERG: Yes, it does, Your Honor.

15 CHAIRPERSON GRIFFITH: All right. Mr.
16 Schaeffer, you have one more witness to conclude
17 ASCAP's direct case, is that --

18 MR. SCHAEFFER: We do, Your Honor,
19 although we have not yet been able to -- we hoped we
20 would meet yesterday, apparently we were unable to --
21 on the question of documents. That in itself, makes -
22 - I'm reluctant to close until that issue is resolved

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1 because it's conceivable I would make an application
2 to bring back Ledbetter and Day.

3 But I would suggest we're going to meet
4 after, I think -- I'm told by Mr. Weiss we're going to
5 try and meet after today's session and see if we can
6 work that out.

7 CHAIRPERSON GRIFFITH: All right.

8 MR. SCHAEFFER: Basically, we have some
9 stuff to set up for Dr. Boyle. I wonder if we could
10 take our lunch break now? It's a little early.

11 MR. RICH: I have a serious problem with
12 that, because during the normal lunch break I have a
13 1:10 p.m. conference call on an unrelated matter that
14 I cannot miss. I gave up my own lunch hour for it.

15 JUDGE GULIN: How long will that take?

16 MR. RICH: At least 30 to 40 minutes.

17 MR. SHORE: Okay, well, we can get
18 started. It's going to take me a few minutes to set
19 up.

20 CHAIRPERSON GRIFFITH: We'll take about a
21 10-minute recess then, at this point.

22 (Whereupon, the foregoing matter went off

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1 the record at 12:00 p.m. and went back on back on the
2 record at 12:07 p.m. in Open Session)
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CERTIFICATE

This is to certify that the foregoing transcript in
the matter of: Hearing: Adjustment of the Rates for
 Noncommercial Educational
 Broadcasting Compulsory License,
 Docket No. 96-6 CARP NCBRA

Before: Library of Congress
 Copyright Arbitration Royalty Panel

Date: March 19, 1998

Place: Washington, DC

represents the full and complete proceedings of the
aforementioned matter, as reported and reduced to
typewriting.

